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Edu-Law Newsletter —

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Teacher's right of free speech affirmed

The recently covered case, *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, 2005 BCCA 393*, was appealed to the B.C. Court of Appeal, which dismissed the appeal by the British Columbia Public School Employers' Association.

The origins of the case involve the B.C. government's recent legislative amendments excluding class size from the scope of collective bargaining. In response, the respondent British Columbia Teachers' Federation (BCTF) forwarded materials to B.C. teachers and encouraged them to discuss the issue with parents. A conflict arose when several school administrators prohibited teachers from posting materials on school bulletin boards or discussing the issue with parents during parent-teacher interviews. As a result of these directives, the BCTF filed a grievance with the Labour Board arguing that the teachers' s. 2(b) Charter rights (freedom of expression) were being violated. After examining the matter, the Labour Board agreed that there was a violation of s. 2(b).

The first issue addressed by the Court of Appeal was whether or not the Charter applied to school boards. The Court found that it did.

The Court then examined whether or not the school boards' directives violated the teachers' freedom of expression rights. Citing previous case law, the school boards argued that s. 2(b) was not intended to apply to government directives to employees relating to their employment activities while on government property and during employer time. In making a determination about whether or not the directives could be excluded from the scope of s. 2(b), the Court found that the employment status of the speaker was not relevant to the determination of whether a violation of the right had occurred. With respect to the issue of whether the location of the speech was determinative in interpreting the right, the Court concluded that the case law was less clear.

The majority of the Court narrowed the issue to whether or not school bulletin boards and parent-teacher interviews invoke the right of freedom of expression and concluded that these forums do invoke such right.

Having concluded that there was a violation of the teachers' freedom of expression, the analysis moved to whether the limitations to the right were justified. The school boards argued that the directives were not "prescribed by law", as they were merely internal policies and were absent any clear statutory authority. The majority of the Court disagreed, finding that the directives were not arbitrary conduct outside of government authority. In addition, they were the type of restriction that an employer might use on his or her property and therefore, could be justified under common law, which is examinable under s. 1 of the Charter (reasonably justified restriction).

The Court indicated that the teachers' expression embodied significant political value, but that its importance had to be offset against the school boards' interests in maintaining effective parent-teacher interviews. The result was that the school boards were required to put forth compelling evidence to justify the infringement, but were not required to be held to the highest standard.

The majority of the Court characterized the school boards' objectives in issuing the

directives to the teachers as ensuring that the parent-teacher interview process met its purpose and through this, maintained public confidence in the school system. The Court found that this objective was rationally connected to the school boards' directives since the directives would effectively limit political discussion during parent-teacher interviews. However, the majority of the Court found that the actions taken by the school boards did not minimally impair teachers' rights to freedom of expression. The majority of the Court went further and commented that the more appropriate way for school boards to address inappropriate actions by teachers was through the College of Teachers. For these reasons the appeal was dismissed.

The dissenting judgment of the Court supported the actions of the school boards, finding that schools should not be used by teachers as political platforms.

The suggestion by the majority of the Court that inappropriate teacher conduct should be addressed through the College of Teachers, rather than through direction and discipline by the school board, implies that the employer-employee relationship between school boards and teachers is different than that of other employers.

It is anticipated that the decision of the BC Court of Appeal will be heard by the Supreme Court of Canada. —

Large damage award in freedom of expression case

The case of *Richard W.O. Morin v. Board of Trustees of Regional Administration Unit #3, (PEI) 2005 PESCAD 14*, has a long history, which has been covered in previous issues of this newsletter. The appellant, Morin, alleged that the Board had infringed his right to freedom of expression under section 2(b) of the *Charter of Rights and Freedoms*. The trial judge found that there had been no infringement. Morin appealed and a majority of the Court found that there had been an infringement and referred the issue of remedy back to the trial judge. The trial judge awarded Morin $15,000 in damages and a portion of his costs, from which Morin further appealed.

Morin had been a grade 9 teacher in 1987-1988 when the incident giving rise to the dispute took place. He showed his language arts class a BBC film entitled "Thy Kingdom Come – Thy Will be Done", which raised questions about the impact of the fundamentalist approach to religion on life and politics in the United States. The film was to serve as a basis for a project called "What Religion Means to Different People", to be completed by his students.

The next day parents began to call the school because they were concerned about both the film and the project. The Vice Principal, in the absence of the Principal, forbid Morin from showing the film again and from giving the project to the students. The Principal re-iterated this position in a meeting with Morin several days later.

Subsequently, the Board created a committee, which reviewed the film and heard submissions from many parties, including Morin. The committee recommended that the appellant be allowed to screen the film and assign the project after consultation with the Principal and Superintendent. The Board adopted these recommendations but no consensus was reached between the parties on how to proceed.

Morin alleged that the Board breached his right to freedom of expression by first, threatening to dismiss him if he showed the documentary and presented the project; second, imposing a leave of absence for the balance of that school year; third, deciding not to rehire him following the conclusion of his contract; and fourth prohibiting him from showing the film and having students do the project subject to consultation with and approval by the Superintendent. The Court of Appeal found that only the last ground was a breach of Morin's rights. The damages later awarded by the trial judge were based only on this last ground.

The trial judge awarded $15,000 in general damages pursuant to section 24(1) of the Charter. He found that the Court of Appeal's finding did not hinge on either malice or bad behaviour by the Board, and he rejected the approach of quantifying damages to include the appellant's marriage breakdown or injury to his reputation, as there was insufficient evidence of a causal connection to the Board's actions regarding these grounds for damages. Moreover, Morin's claim for compensatory damages for future loss of employment income as a tenured teacher and the associated pension benefits was not allowed. The trial judge held that, since there had not been constructive dismissal (decided in previous related proceedings), in the context of the Charter breach, the issue of the decision of the Board not to re-hire him would not be considered. The judge found that there was no causal connection between the infringement and the decision not to re-hire the appellant. The claim for punitive damages was also denied.

Morin appealed the decision regarding damages on the basis that the trial judge had erred in not awarding compensatory and punitive damages and had erred in valuing the quantum of damages. The Court of Appeal allowed the appeal in part and awarded the appellant

$75,000 in general damages plus part of his legal costs.

In reaching its decision, the Court of Appeal agreed with the lower Court that there was no causal connection between the infringement of Morin's right to free speech and the decision not to offer him a contract of employment for the following school year. The Court of Appeal also indicated that the trial judge was correct in finding that punitive damages were unwarranted, as there was no malice or bad faith on the part of the Board. With regard to general damages for the breakdown of Morin's marriage and injury to his reputation, the Court of Appeal agreed that there was no causal connection to the Charter breach.

The Court of Appeal did however, find that the evidence established that there were effects and consequences that resulted from the infringement of the appellants section 2(b) right that the trial judge had overlooked in reaching his decision regarding the quantum of the award. The Court of Appeal found that the reaction of the Vice Principal and the Principal to the showing of the film and the project and their failure to first consult with students, parents or Morin, constituted an arbitrary use of their administrative power, which started a chain of events over the ensuing months that increased the quantum. These events included firstly Morin having to take sick leave; secondly, some students refusing to attend his class and some parents objecting to their children being in his class; thirdly, his mandatory leave of absence with pay; and fourthly, the media attention and the public controversy that resulted from the incident.

The Court of Appeal found that the infringement and controversy that followed consumed his time, energy and affected his health rendering him unable to seek other employment for the next school year, and thus, attracted a larger general damages award.

The revised award of $75,000.00 in damages was designed to reflect the effects of the infringement of the appellant's right to freedom of expression.

The extensive damages awarded appear to be the result of a snowball effect resulting from the Vice Principal's and Principal's decision forbidding Morin to show the video and proceed with the assignment. This case highlights that, despite a need to act quickly, Administrators should take the appropriate time to consult with senior staff and make reasoned, not reactive decisions. —

Tribunal decision in IBI case upheld

In *Clough (Litigation Guardian of) v. Simcoe County District School Board, [2005] O.J. No. 2124*, the Divisional Court upheld a Special Education Tribunal decision affirming the decision of the Board's Identification and Placement Review Committee with respect to Jared Clough's special education identification and placement.

Jared, a twelve year old boy living with autism, is non-verbal and according to his mother, "on the more profound end of the [autism] spectrum".

In June 2002 an Identification and Placement Review Committee placed Jared in the Primary Autism Pilot Project (APP) at Algonquin Ridge Elementary School. This decision was appealed by Jared's mother to a Special Education Appeal Board, which upheld the placement decision. A further appeal to the Special Education Tribunal also affirmed the initial decision and Ms. Clough, applied for judicial review of the Tribunal's decision.

The standard of review applied by the Court was one of reasonableness. The Court elaborated on this standard as encompassing a "somewhat probing examination" of the Tribunal's decision, without amounting to a re-trying of the matter.

The applicant, Ms. Clough, sought the implementation of an Intensive Behavioural Intervention (IBI) Program for her son. IBI is a comprehensive treatment program for children living with autism and is monitored by a registered psychologist and delivered by therapists. Ms. Clough filed affidavit evidence from two doctors stating that IBI was "medically necessary" for Jared.

The Tribunal had concluded that, based on the affidavit evidence filed and the fact that psychologists and therapists are not authorized to give instruction in Ontario schools, Ms. Clough was seeking therapy and not education. The Divisional Court found that this was a reasonable conclusion for the Tribunal to make.

The applicant also argued that the Tribunal was unreasonable in failing to find an IBI program superior to the APP placement. The Tribunal had concluded that making such a determination was not within its jurisdiction; rather, it was to determine whether or not the placement was appropriate to meet Jared's needs. The Tribunal examined Jared's needs and the placement at great length and noted that no other student in the school board received as much support as Jared. Reviewing this decision-making process, the Court concluded that the Tribunal was reasonable in deciding that the APP placement adequately met Jared's needs.

The Court also found the Tribunal's treatment of human rights and Charter principles was reasonable. The applicant had argued that the Tribunal erred when it failed to apply human rights and Charter principles to the case before it.

The Court found that, while the Tribunal's decision did not articulate a detailed analysis under the *Human Rights Code* or the Charter, the decision did recognize Jared as a "special person with special needs" and therefore, the Tribunal met its obligations under the *Charter of Rights and Freedoms* and *Human Rights Code*.

Finally, the applicant argued that the recent decision in *Wynberg v. Ontario, [2005] O.J. No. 1228*, should carry persuasive weight with the Court. In *Wynberg*, the Court examined the provision of IBI therapy for children with autism between the ages of two and five, and the absence of funding for IBI therapy for children of school age. Several parents of school aged children living with autism alleged that the government's failure to fund IBI therapy for children past the age of six was a violation of their s. 7 (life, liberty and security of person) and 15 (equality rights) Charter rights and a violation of the *Education Act*. The Court agreed, finding violations of both the Charter and the *Education Act*. The decision is currently under appeal.

The Court in *Clough* concluded that while *Wynberg* was a useful source for information, the decision was beyond the scope of the Court, whose role was strictly to review the reasonableness of the Tribunal decision. Further, the *Wynberg* decision was the result of a lengthy trial pertaining to different children and therefore, it was inappropriate for the Court to apply the same reasoning to a completely different case and Court process. The Court dismissed the appeal without costs.

This decision is only the second Tribunal decision reviewed by the Court and provides important guidance regarding the standard of review to be applied by the Court to the Tribunal's decisions. The decision also confirms that the decision in *Wynberg* currently under appeal, applies only to the Plaintiffs in that case. —

Procedural fairness required in athletic organization discipline

The plaintiff in *Street v. B.C. School Sports, [2005] B.C.J. No. 1523*, applied to the Court for a declaration that BC School Sports had breached Street's contractual rights when it suspended him from coaching basketball. Street had been teaching and involved with school athletics for 28 years and was coach for B.C. School Sports, a private, self-governed, voluntary organization. BC School Sports' operational guidelines were enacted by its membership, which consisted of approximately 400 public and private schools across British Columbia. The organization provided conduct guidelines and regulated the administration of school sports within its membership.

The Court began by dispensing with two initial matters pertaining to the case. First, it concluded that the action was properly commenced. BC School Sports was not governed by statute and had no formal affiliations with the government or with school boards; therefore, it was not covered by the *Judicial Review Procedure Act*, which applies to statutory bodies. Despite this conclusion, the Court did suggest that, while the action was properly founded in contract, the principles of administrative law were applicable to the proceedings.

The second introductory issue was whether Street was a "member" of BC School Sports. Technically, "members" of BC School Sports were schools, not individuals; however, the Court pointed out that several terms of the contract in question, which were found in the BC School Sports' Handbook and Directory, purported to bind individual coaches. For example, there were sections addressing coach conduct, coaching guidelines and other related matters. For these reasons, and given that Street did not mount a serious argument to the contrary, the Court concluded that he was properly a party to the relevant contract.

BC School Sports had found Street guilty of violating the provisions in its Rules regarding student recruitment and had consequently suspended him from coaching basketball. The organization argued that the Court lacked jurisdiction to hear the matter because the BC School Sports' Handbook contained a privative clause, which purported to prohibit review by the Courts of any decision by the organization. The Court concluded that, while it was precluded from reviewing the decision on its merits, it did retain a role over the process applied to supervision. Thus, the Court examined the procedural errors alleged by Street. Streets' allegations fell into three categories: notice, procedural fairness and bias. He alleged that the notice provided by BC School Sports was insufficient because it did not include reference to all of the students to whom the allegations against him applied, and because he was not informed of the full extent of the potential penalty he was facing. Further, he argued that the organization committed errors amounting to a violation of natural justice, including violating evidentiary rules and causing irregularities in its own procedures. Finally, it was Street's position that the only reasonable explanation for the errors made by BC School Sports was bias.

The Court first addressed the issue of bias and concluded that there was no evidence that the errors made were the result of bias. Next, it examined the alleged errors with respect to notice and procedural fairness. While the Court agreed with Street's claim that errors had been made, the issue was whether these errors amounted to unfairness

resulting in the denial of natural justice. The Court found that, neither the individual errors nor the process as a whole, amounted to a denial of natural justice. As a result, the Court dismissed the action.

The application of administrative law principles to an action between private persons is arguably the result of BC School Sports acting as a representative of public schools, although not their respective school boards. In Ontario, where many school boards, as well as their respective schools, are members of athletic authorities a similar application of the rules of procedural fairness might be accorded to the decisions of the governing body. Therefore, organizations should be careful to follow a fair process when limiting the rights of both volunteer and paid coaches, as well as participating students and schools. —

School closings in Alberta and B.C.

Two recent decisions regarding school closures, *Bellamy v. Edmonton Public School Board No. 7, [2005] A.J. No. 526*, and *Kelley v. Saanich School District No. 63, [2005] B.C.J. No. 1952*, raise some interesting issues for school boards. Both decisions dealt with applications brought by the parents in the school community to prevent the school board from closing the neighbouring school, and both decisions allege that the school board failed to meet procedural requirements which, in effect, caused irreparable harm to the community or denied the appellants procedural fairness. However, in *Bellamy*, the application was brought prior to the school board having made a decision to close the school, whereas in *Kelley*, the applicants waited until the school board's decision was made. Ultimately, the applicants in *Bellamy* were successful, while the applicants in *Kelley* were not.

In Bellamy, the Board scheduled a meeting to discuss possible school closures. The Applicants brought an application for an injunction to prevent the school board from closing three schools prior to the meeting scheduled by the school board for that purpose. The parents alleged that the Board failed to comply with a number of requirements for school closures, as set out in Alberta Regulation 238/97 (Closures of Schools), in particular, they alleged that the school board failed to accommodate parents who did not read or write English, failed to provide sufficient notice to affected parents and failed to disclose a long-term capital plan.

The school board moved to strike the claim as disclosing no cause of action because an alleged breach of a statutory duty could not form a cause of action. The school board also took the position that since no decision had yet been made to close the schools, the action was unfounded and should be dismissed as premature.

Since the applicants had applied to the Court for an injunction before a decision had been made, rather than bringing an application for judicial review following the decision to close a school, the Court was limited with respect to how it could deal with the application. In particular, the Court noted that a pleading could not be struck if there was the faintest chance that it might succeed at trial. With respect to the argument of prematurity, the Court found that the application was intended to force compliance with procedures prior to any closure motion being tabled and was therefore, not premature. While the Court agreed that the proper procedure to challenge a decision to close a school was by way of judicial review, it found that, in the present case, there was no public interest in proceeding by judicial review which was greater than the issue on the application, and thus, granted the application for injunctive relief. The Court found that there was a serious issue to be tried, irreparable harm would result if there was a lack of notice and inadequate information given to parents, and the balance of convenience favoured the applicants because an injunction would not prevent the Board from holding a meeting, but would limit the scope and purpose of the meeting in order to protect the integrity of the issue in dispute.

The applicants in *Kelley* brought an application for judicial review to quash a school closing by-law. In *Kelley*, the applicants alleged that they had been denied procedural fairness after the Board made the decision to close a school. At issue was whether the applicants had been given an opportunity to fully present their case to the Board of Trustees, and whether adequate notice had been provided to them prior to the decision to close the school. The school board's policy required that there be a consultation period of at least six months between the date of a "proposed closure" being announced and the date on which the decision was to be made. The Board argued that there had been ample consultation, both before and after the date that the Board first considered closure.

In August of 2004, an information booklet was sent to all parents in the jurisdiction of the school board informing them of the initiation of a public consultation process with respect to school facilities, the ongoing shortfall of provincial funding and declining student enrolment. Six meetings were held in total, three at the end of September, followed by a newsletter from the Principal of the school describing the meetings and providing notice of the next three meetings, which were held in November. One of the November meetings

involved the identification of schools for closure. The school later closed was one of the schools identified. The applicants did not participate in the consultation process.

Following the six consultation meetings, a working group prepared a report on December 6, 2004, which described eight options for addressing the funding shortfall. The options included consolidating student populations by closing schools and changing student boundaries. Several of the options involved closing the school at issue. On December 6, 2004, a special public meeting was called for December 15, 2004 to determine what options, if any, the District would consider regarding further detailed work by staff or consultation pursuant to its policy. At the meeting, the Board adopted some of the options set out in the working group report. On December 16, a media advisory indicated that the school board had served a notice of its intent to close the school effective June 30, 2005.

The applicants alleged that the period between December 6th and 15th was the critical period, and that there was no ability to consult effectively with the school board regarding the decision to close the school, which they argued was made on December 15. In response, the school board indicated that the "proposed closure" contemplated by the administrative policy was announced on December 15, 2004, not December 6 when the working group report was issued.

The Board held several meetings between January and May 2005 at which presentations were made by the school community. On May 11, 2005, another report was issued addressing issues such as school boundaries, transportation, after school care, and staff, parent and student introduction to new sites. The Board of Trustees called a special meeting for June 20, 2005 at which oral presentations and written submissions of the school's parents were made. At the end of the meeting, the Board passed a motion to close the school.

The Court held that the school board's duty of procedural fairness was to ensure that the appellants had an opportunity to fully and fairly present their case to the Board of Trustees prior to the Board making its decision to close the school. The Court also commented that a school board's failure to follow its own policy for notice does not necessarily mean there had not been procedural fairness. Similarly, the Court commented that, simply because a school board followed its policy and procedures, does not mean that there has been procedural fairness. The Court found that the six month period of consultation required by the school board's policy began on December 15th, not December 6th, as alleged by the applicants. The Court also found that during this period, the Board consulted with the parties affected, including parents, community members, district staff, school staff, and municipal representatives.

With respect to the issue of notice, the Court found that, although notice was not given directly to all of the parents of the students at the school, there was adequate notice of both meetings and the existence of working groups through the media, through the parent advisory council and from the principal. Regarding the issue of consultation, the Court accepted the school board's argument that the closure of the school on December 15 was only a proposed option and that, if, during the six month period, issues affecting the closure could be satisfactorily resolved, the final closure would not have been made. While the Court noted that the process in this case was far from perfect, the Court dismissed the application concluding that there was public consultation both before and after December 15, 2004 and that the process followed was procedurally fair. —

Board compelled to release OSR

The matter of *D.N. vs. Kawartha Pine Ridge District School Board, [2005] O.J. No. 3107*, involved the production of a student's Ontario School Record.

The issue arose from an action by S.N, against the Children's Aid Society and the Board. For a period of four years, S.B., whose OSR was being sought, sexually abused and intimidated S.N., a student with special needs, while both students attended a school under the jurisdiction of the Board. S.N.'s claim alleged that the Board knew or ought to have known from S.B.'s educational history that he posed a special risk of harm to vulnerable students such as S.N., and further that the Board breached its duty of care by not protecting S.N. from abuse.

The Children's Aid Society, also named in the action, brought a motion to compel the Hamilton-Wentworth District School Board to produce S.B.'s OSR. The CAS was and continues to be S.B.'s parental guardian.

S.B. began his schooling with Kawartha Pine, but later transferred to a school located within the Hamilton-Wentworth District School Board's jurisdiction.

The motion was opposed by the Hamilton-Wentworth District School Board and by a lawyer appointed by the Court to protect S.B.'s interests. Both parties argued that section 266 (2) of the *Education Act* made the OSR privileged, and

that privilege could not be waived by the CAS, because it had a conflict of interest between its rights as a defendant in the action and its duty as legal guardian to act in S.B.'s best interests.

The Court found that the CAS was not clearly in a position of conflict. The Court relied on the case of *Children's Aid Society of the Regional Municipality of Waterloo v. L.(T), [1990] O.J. No. 1174*, where the Court held that "...when an Agency can produce an order of wardship, either temporary or permanent to the principal or the appropriate authority at the school, the school must produce that OSR 'for examination'."

The Court held that the interests of all the parties to the litigation outweighed any privacy interests of S.B. The records were created prior to and during the time of the alleged sexual abuse, and it would be probative for the parties to know what was known by the Board about S.B.'s sexual predilections. The Court placed terms on the disclosure of the OSR to minimize any adverse impact on S.B.

This case demonstrates the balancing of interests that must frequently take place when students' privacy rights are at issue. —

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October 28, 2005

hosted by: Keel Cottrelle LLP

Complimentary session on

"Special Education Issues"

Capitol Banquet Centre, Mississauga, Ontario

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